

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Legion of Christ College, Inc.)	NCE MX Group No. 327
)	
Application for a New NCE FM Station at)	File No. BNPED-20071019AME
Wethersfield, Connecticut)	Facility I.D. No. 175802
)	
and)	
)	
Northeast Hartford Acorn)	
)	
Application for a New NCE FM Station at)	File No. BNPED-20071019AMM
Manchester, Connecticut)	Facility ID No. 173376

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2014

Released: April 16, 2014

By the Commission:

1. The Commission has before it an Application for Review (“AFR”) filed by Northeast Hartford Acorn (“NHA”) on December 20, 2010. In the AFR, NHA seeks review of a Media Bureau (“Bureau”) decision¹ that denied NHA’s Petition to Deny (“Petition”) the captioned application of Legion of Christ College, Inc. (“LCC”) for a new noncommercial (“NCE”) FM Station at Wethersfield, Connecticut (“LCC Application”), dismissed the captioned application of NHA for a new NCE FM station at Manchester, Connecticut, and granted the LCC Application.² For the reasons set forth below, we dismiss the AFR.

2. LCC and NHA filed their respective applications during a filing window opened by the Commission in October 2007.³ Subsequently, the Commission determined that the applications were mutually exclusive and identified them as part of MX Group 327.⁴ The Commission identified the LCC

¹ *NCE MX Group 327*, Letter, Ref. 1800B3-VMM (MB Nov. 18, 2010) (“*Staff Decision*”). See also *Broadcast Actions*, Report No. 47368 (MB Nov. 23, 2010).

² LCC filed an Opposition on January 24, 2011 (“AFR Opposition”). NHA filed a Reply on February 1, 2011 (“AFR Reply”). NHA argues in the AFR Reply that the AFR Opposition is defective because the Certificate of Service did not indicate that a copy had been provided to the Office of the Secretary, but rather only to NHA and the Bureau. See AFR Reply at 2. Contrary to NHA’s assertions, Commission records confirm that the AFR Opposition was properly filed with the Office of the Secretary on January 24, 2011.

³ *Media Bureau Announces NCE FM New Station and Major Modification Application Filing Window for New and Certain Pending Proposals; Window to Open on October 12, 2007*, Public Notice, 22 FCC Rcd 6726 (MB 2007).

⁴ *Media Bureau Announces Groups of Mutually Exclusive Applications Submitted in the October 2007 Filing Window for Noncommercial Educational FM Stations*, Public Notice, 23 FCC Rcd 95084 (MB 2008).

Application as the tentative selectee of MX Group 327, accepted the LCC Application for filing, and announced a 30-day period for filing petitions to deny the LCC Application.⁵

3. NHA filed the Petition on June 28, 2010.⁶ It argued that LCC lacked reasonable assurance of site availability at the tower site identified in the LCC Application.⁷ NHA explained that one of its representatives contacted SBA Communications (“SBA”), the current owner of the tower site, and the SBA representative was unable to confirm that LCC had obtained permission to use the proposed tower.⁸ In the Opposition, LCC noted the proposed tower site was, in October of 2007, owned by Optasite Tower, LLC (“Optasite”), and provided e-mails dated October 16, 2007, between Stephen Gajdosik, LCC’s engineer, and Kevin Gallagher, a representative of Optasite.⁹ The emails showed that Gallagher had informed Gajdosik that LCC could use the proposed tower.¹⁰ The Bureau determined that these emails demonstrated that LCC had obtained reasonable assurance prior to filing the LCC application.¹¹

4. NHA seeks review of the *Staff Decision*. It now argues that LCC lacked reasonable assurance of site availability because the proposed tower did not exist at the time LCC filed its application and that in fact Optasite had apparently cancelled its plans to construct the proposed tower in March of 2007.¹² NHA makes this argument for the first time in the AFR.

5. Upon review of the AFR and the entire record, we conclude that NHA’s argument must fail because NHA never presented it to the Bureau. Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Commission’s Rules bar applications for review that rely “on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass.”¹³ We will therefore dismiss the AFR.¹⁴

⁵ See *Comparative Consideration of 52 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 8793, 8811, 8840 (2010).

⁶ LCC filed an Opposition on August 26, 2010 (“Opposition”). NHA filed a Reply on February 2, 2011.

⁷ LCC Application at Section VII, Question 3. The *Staff Decision* incorrectly stated that LCC proposed to mount its antenna on an existing tower. LCC never made such a representation in its application or subsequent pleadings.

⁸ Petition at 2. As noted by the Bureau in the *Staff Decision*, NHA failed to provide the name of its representative or that of the SBA representative with whom he or she spoke, much less an affidavit of an individual with first-hand knowledge of such a conversation attesting to NHA’s allegations. See 47 USC § 309(d)(1).

⁹ Opposition at 3 and Attachment 1.

¹⁰ *Id.* at Attachment 1.

¹¹ *Staff Decision* at 2-3.

¹² AFR at 2-3.

¹³ See 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission’s order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

¹⁴ In any event, were we to consider NHA’s new argument, we would deny the AFR. Even if Optasite did not intend to construct the proposed tower, its agent nonetheless indicated that the site was available for LCC’s proposed station. That is sufficient to satisfy the requirement of reasonable assurance of site availability. The Commission has held that applicants who misplace their reliance on someone who lacks authority have still obtained reasonable assurance. See, e.g., *Millard V. Oakley*, Opinion, 42 RR 2d 1495 (1978) (holding that the recipient of a construction permit for an AM station, whose real estate broker erroneously informed him that a site was available, had obtained reasonable assurance of site availability). Additionally, there is no requirement that an applicant propose using an existing tower at the time it files its application. See, e.g., *NCE Reserved Allotment Group 7*, Letter, 27 FCC Rcd 11218, 11221-23 (MB 2012) (finding that applicant had reasonable assurance of site availability where land owner had agreed to allow it to construct a new tower on the specified site).

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,¹⁵ and Section 1.115(c) of the Commission's Rules,¹⁶ the Application for Review filed by Northeast Hartford Acorn IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁵ 47 U.S.C. § 155(c)(5).

¹⁶ 47 C.F.R. § 1.115(g).